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Supreme Court of the United States

October Term, 1937.

Nos. 779, 780, 781.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

PHILIP L. GERHARDT,
Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

BILLINGS WILSON,
Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JOHN J. MULCAHY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES.

MARKELL C. BAER,
Oakland, California,

Attorney for the American
Association of Port Authorities.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Comes now the American Association of Port Authorities, by its counsel, Markell C. Baer, and petitions this Court for leave to appear herein as Amicus Curiae and to file the sub-

joined brief in behalf of the position of the Respondents in the above cases, and in support thereof respectfully shows:

1. Your Petitioner is an organization, the membership of which includes agencies and instrumentalities of the States of the United States, and of their municipalities, engaged in the work of the development and operation of their respective ports and harbors.

2. The issue presented is whether a state agency engaged in the work of port and harbor development is engaged in an essential governmental function and is immune from Federal taxation. Since your Petitioner is an Association composed of such agencies, and since any decision with relation to The Port of New York Authority, one of its members, may well be determinative of the tax status of many of its members, the interest of your Petitioner in the outcome of these cases is patent. That interest is more fully set forth in the Statement in the subjoined brief, which Statement this Honorable Court permitting, is incorporated herein by reference.

WHEREFORE, the undersigned, on behalf of the American Association of Port Authorities, prays leave to appear herein as Amicus Curiae and to file the subjoined brief in behalf of the position of the Respondents in the above cases.

MARKELL C. BAER,
Attorney for the American
Association of Port Authorities.

Dated: March, 1938.

The undersigned, attorneys, respectively, for the Commissioner of Internal Revenue and for the Respondents herein, raise no objection to the granting of leave to the American Association of Port Authorities to appear and file a brief herein as Amicus Curiae.

Robert H. Jackson

Solicitor General of the United States.

Julius Henry Cohen

JULIUS HENRY COHEN,
Attorney for Respondents.

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BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES, AS AMICUS CURIAE.

Statement.

The American Association of Port Authorities is, by its Charter, an association composed "of legally established port

organizations and state harbor boards, having jurisdiction over one or more ports".

American ports represented in the Association include among others:

Port of Albany	Port of New York
Port of Boston	Port of Oakland
Port of Chicago	Port of Olympia
Port of Coos Bay	Port of Oswego
Port of Corpus Christi	Port of Philadelphia
Port of Galveston	Port of Portland (Me.)
Port of Honolulu	Port of Portland (Ore.)
Port of Houston	Port of Providence
Port of Lake Charles	Port of San Francisco
Port of Long Beach	Port of Savannah
Port of Los Angeles	Port of Seattle
Port of Milwaukee	Port of Stockton
Port of Mobile	Port of Tacoma
Port of Newark	Port of Trenton
Port of New Orleans	Port of Wilmington

In addition, there are the following state organizations:

California Board of State Harbor Commissioners,
Massachusetts Department of Public Works,
New Jersey State Board of Commerce and Navigation, and
South Jersey Port Commission.

The ports listed above have a great stake in the outcome of these appeals. If the Federal power to regulate interstate or foreign commerce, or the constitutional requirement of Federal consent to a compact, be held to give rise to the power to levy taxes on port facilities—contentions already repudiated by every court before which they have been raised—then no port in the country may be free from such a Federal tax on its revenues, its bonds and the salaries of its employees.

The ports of the United States have, for a long period of time, relied upon many decisions of the Board of Tax Appeals and the Circuit Courts of Appeals, which have unanimously held that such activities are immune. Prior to the instant cases, the Commissioner of Internal Revenue has never taken appeals to this Court from those decisions. The ports have, therefore, arranged their budgets, issued bonds and adjusted salaries on the basis of a tax immune status, which they have justifiably assumed as a result of those decisions. Of the opinion of Honorable Charles Evans Hughes, dated November 10, 1925, holding the bonds of The Port of New York Authority immune from Federal taxation, the Supreme Court of California has said:

> "While the opinion of the learned chief justice does not have the force of judicial precedent, it does express the opinion of a very distinguished lawyer and an eminent jurist." *In Re California Toll Bridge Authority*, 212 Cal. 298, 304.

The attempt in these cases to overrule that body of precedent seriously threatens the free and independent right of coastal States and the States of the Great Lakes to develop their ports and harbors, through such instrumentalities as The Port of New York Authority. To anyone at all familiar with the organization of port bodies, it is obvious that ordinary corporate income tax on their net revenues would cripple and bankrupt them. Created on the basis of government service in the development of ports, the impost of Federal taxes, even if they were able to raise it, would frustrate their entire public purpose.

The Association includes four port bodies which have successfully defended their constitutional immunity before the Board of Tax Appeals and the Circuit Courts of Appeals:

The Port of New York Authority, the Albany Port District Commission, the Port of Houston and the California Board of State Harbor Commissioners.

Of these, The Port of New York Authority has, on three occasions, been upheld by the Board of Tax Appeals: *Moisseiff* v. *Commissioner,* 21 B. T. A. 515 (1930); *Carey* v. *Commissioner,* 31 B. T. A. 839 (1934); and the instant cases below (1936). The present cases were unanimously affirmed by the Circuit Court of Appeals on the authority of the decisions of this Court in *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; *Brush* v. *Commissioner,* 300 U. S. 352; and its own prior decision in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515.

The Albany Port District Commissioner has been held immune in *Fitzgerald* v. *Commissioner,* 29 B. T. A. 1113 (1934), and *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515 (1935).

The Port of Houston authority was held immune in *Wait* v. *Commissioner,* 35 B. T. A. 359 (1937); the California Board of State Harbor Commissioners in *Platt* v. *Commissioner,* 35 B. T. A. 472 (1937). Peculiarly enough, in the case of the California Board of State Harbor Commissioners, the Commissioner has accepted the views of the Board. On August 6, 1937, in a letter addressed to the Secretary of the California Board, the Bureau of Internal Revenue declared:

> "You are advised that after careful consideration it is held that the compensation paid to you by the Board of State Harbor Commissioners of the State of California is immune from Federal Income tax."

POINT I.

PORT AND HARBOR DEVELOPMENT IS AN ESSENTIAL GOVERNMENTAL FUNCTION TRADITIONALLY EXERCISED BY GOVERNMENTAL AGENCIES.

We can conceive of no better evidence of a governmental function than the fact that it has always been, and is today, carried on by governmental agencies throughout the world.

The development and control of ports and harbors has historically been the concern of government. This traditional development of ports by governments from the earliest times is set forth in Point IV of Respondents' Brief and need not be repeated here. The Solicitor General cannot but recognize it. He says of the Port Authority:

> "We readily agree that its activities in building bridges and in developing the port are appropriate fields for state action and *are sanctioned by long usage.*" (Petitioner's Brief, p. 63; italics ours).

The function is not only historically governmental—it is universally carried out by governments throughout the world today. Before we review the universal practice of governments in developing their ports, a word is in order as to the kind of operations required in the development of a modern port. At the Port of New York, for instance, the States have revolutionized the freight handling methods and terminal system, have defended the interests of the Port and its flow of commerce from both domestic and foreign attack, and have provided great highway arteries over and under its encircling waters to speed the flow of its commerce. This is the same type of work that the Federal Government itself

found necessary to do in the Panama Canal Zone, where it operates and controls directly all the piers, wharves, warehouses and storage facilities at both Atlantic and Pacific termini of the Canal.

The authorities on the subject, going back to the Seventeenth Century, emphasize that the provision of adequate terminal facilities is of the essence of this governmental duty of developing ports. Thus, Lord Hale (1609-1676), writing "Concerninge the Ports, Theyre Natures and Originalls", says:[1]

> "A port is an agregate thinge, partly naturall, vizt. the contiguity of the sea or some creeke thereof, or some nauigable riuer, wherby vessells may haue accesse to unlade, and partly artificiall, vizt. keyes and landinge places and howses and receptacles for mariners and merchandizes, as the port of London, of Douer, of Southhampton, Bristoll, etc., wherein though the denominatione bee from the town or city, which is as it were *caput portus,* yet the port itself is a thinge of larger extent, and takes in sometymes a greate tract of water or nauigable riuers; as the port of London includes all the river Thames down below Grauesend, the port of Bristoll includes the channel of Seuerne vp to Gloucester and down to Kingrode and Hungrode."

At a far more recent date (1935), the Circuit Court of Appeals, for the Second Circuit, has similarly regarded port requirements, when it said (*Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 517):

> "The essence of port and harbor development is to provide adequate terminal facilities."

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[1] "A Narrative Legall and Historicall Touchynge the Customes", as quoted in Stuart A. Moore's "History of the Foreshore and the Laws Relating Thereto", at page 319.

A survey of the conduct of port activities in foreign countries and throughout the United States reveals that direct agencies of government, similar to The Port of New York Authority, have been universally created for the purpose of developing and supervising ports; that in nearly all such instances, they are constituted similarly to The Port of New York Authority; and that they similarly own or operate large sections of the terminal and highway facilities of the harbor area.

The following factual review of governmental activity in port development is suggested by the learned opinion of the Circuit Court of Appeals, for the Second Circuit, in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515.

London and Other English Ports.

From very early times governmental agencies have owned and operated wharves and other terminal facilities in the area which now comprises the Port of London. This governmental control continued for some centuries. However, during the Nineteenth Century the great English dock companies had secured some measure of private control of port facilities under Charters of Parliament. But the abuses of this private control were so many and manifest that it became imperative for the government to reorganize the port facilities and once again take over directly the duties which they had historically exercised. First, there was appointed a Royal Commission to investigate the conditions existing in the Port of London,[1] just as did New York and New Jersey in 1917 in dealing with their problem of organization of the Port of New York.

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[1] See The Port of London, by D. J. Owen (1927) at page 22.

In June 1902 the Royal Commission presented its comprehensive report, containing recommendations for the creation of *a new governmental authority* and for transferring thereto the properties and obligations of all the dock companies and of all other organizations and companies, both public and private, controlling wharves, terminals or other facilities of the London port district.

In the concluding paragraph of its Report the Commission recognized the public importance and necessity of *unified* governmental control over all port facilities.

> "The deficiencies of London as a Port, to which our attention has been called, are not due to any physical circumstances, but to causes which may easily be removed by a better organisation of administrative and financial powers. The great increase in the size and draught of ocean-going ships has made extensive works necessary both in the river and in the docks, but the dispersion of powers among several authorities and companies has prevented any systematic execution of adequate improvements. Hence the Port has for a time failed to keep pace with the developments of modern population and commerce, and has shown signs of losing that position relatively to other ports, British and foreign, which it has held for so long. The shortcomings of the past cannot be remedied without considerable outlay. We are, however, convinced that if in this great national concern, energy and courage be shown, there is no reason to fear that the welfare of the Port of London will be permanently impaired." "The Port of London" by D. J. Owen, *supra* at page 23.

The entrusting of regulation, control and operation of all of the terminal facilities of a port to a centralized public agency was not unusual in England at the time the recommendations of the Royal Commission were submitted to Parliament. Control of waterfront facilities of the Port of Liverpool had been entrusted to a governmental agency, the Trus-

tees of the Liverpool Docks in 1811. That board continued in existence as a combined regulating, owning and operating agency until 1857. The Mersey Docks and Harbor Board, constituted by an Act of Parliament in 1857 took over the entire control of the port with powers in many respects greater than those of The Port of New York Authority or the Port of London Authority.[1]

Similar control of the facilities of the Port of Glasgow has existed since 1858 under the Trustees of the Clyde Navigation, although the origin of this governmental agency and of its powers with respect to harbor facilities at Glasgow dates back to 1759.[2] The Tyne Improvement Commission derives its powers from legislation adopted by Parliament in 1850-1861. The present by-laws of the Commission were adopted in 1884.[3]

All of the dock facilities of the Port of Bristol had been for a long period of time owned and controlled by the municipality,[4] and Leith, Cardiff, Dundee and Sunderland, to mention only a few of the other ports of England and Scotland were similarly under governmental operation and control over a long period of time.

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[1] See The Mersey Docks and Harbour Act, 1857—Act. 20 & 21 Vict. ch. 162; also The Mersey Dock Acts Consolidation Act, 1858—Act 21 & 22 Vict. ch. 92. See "The Port of Liverpool", published by the Mersey Docks & Harbour Board (1923) excerpts reprinted in "English Port Facilities" by F. T. Chambers—U. S. Government Printing Office 1919, Appendix 5.

[2] "English Port Facilities," *supra,* Appendix 24.

[3] "English Port Facilities," *supra,* Appendix 28.

[4] "English Port Facilities," *supra,* page 59.

A Bill for creation of the new Port of London Authority was presented to Parliament in 1903 but it was not until 1908 that the enabling legislation was finally enacted. With the creation of the Authority, unified governmental control of all port facilities in the Port of London became an accomplished fact.[1]

The powers of the Port of London Authority were consolidated, amended and extended by the Port of London Consolidation Act of 1920. The Port of London Authority is a self-liquidating public corporation which owns and operates all of the port facilities in a large geographical district. It is empowered to make regulations with respect to practically all matters concerning navigation and shipping in that district other than customs and excise regulations; to charge river duties, tonnage charges and other tolls and make charges on the use of its facilities. The Port of London Authority maintains its own police force for the enforcement of its regulations and its own operating force in connection with many of its facilities. It is a creature of public necessity and clearly an instrumentality of government.

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[1] The name "Authority" found its first use in the title of the Port of London Authority. It came about as Lloyd George's suggestion in the search for a better name than "Board" or "Commission", and arose from the frequent use of the phrase "Authority is given" at the beginning of each grant of power in the Act. Your Amici, the American Association of Port Authorities, has taken the same name as descriptive of all agencies dealing with port and harbor development.

Hamburg and Northern European Ports.

As the Circuit Court of Appeals pointed out in the *Ten Eyck* case (76 F. [2d] 515, 517), the Port of Hamburg like other northern European ports is operated under the supervision of a government-controlled committee for trade, shipping and industry. (The Court cited "The Port of Hamburg", by L. Wendemuth and W. Böttcher, p. 180). This government body is operated usually at a loss, or at best, earns only sufficient operating revenues to meet the cost of its facilities. The committee controls and regulates the dock facilities and provides for warehouses, ferries and piers. The committee is operated on the same basis as all other governmental agencies of the Reich.

A similar type of port control and operation of facilities is found not only in the other ports of the Hanseatic League but throughout Northern Europe. Antwerp, Amsterdam, Rotterdam, Bremen, Copenhagen (except for the privately owned free port), Swedish, Finnish and Norwegian ports, as well as the free city of Danzig, possess similar port organizations. They are controlled, in most cases, by the municipality, although in all cases there is a direct responsibility to the Central Government, so that in these instances the agency must be regarded not merely as a municipal department but as an independent governmental agency in and of itself. Thus, we find that in Rotterdam, where the municipality is the proprietor of the basins and the adjoining waterfront and provides for the construction of port basins, quays and roadways, these services have become centralized in a municipal agency called "Havenbedrijf der Gemeente Rotterdam" which administers the harbor service, pilotage in the harbor, the leasing of grounds owned by the municipality,

the operating of the Handelsinrichtingen (a quay and warehouse area operated by the municipality itself), as well as the dry docks and ferries in the port.[1]

In Antwerp many quays along the shore, and the barge docks south of the city were constructed by the state but are operated and regulated by the municipal port agency for the joint account of the city and the state pursuant to special agreement. The city also controls and regulates dock facilities in other portions of the harbor which it has itself built.[2]

French and Southern European Ports.

The organization of French ports follows a standardized pattern developed by the Central Government and given its most recent sanction in legislation passed in 1920. The guiding principles of port development in that country are summarized in the preface to the Annual Report of the Port Autonome du Havre for 1928. It is there stated at page 5:

> "Since January 1, 1925 the Port of Havre has been an independent autonomy administered under the provisions of the Law of June 12, 1920.
>
> The administration of the port is carried on by a Council comprised of twenty-one members:
>
> * * *
>
> The Council of Administration passes definitely on everything which concerns the works, the commerce and the development of the port except for those works involving essential changes or modifications in the facili-

[1] See "The Port of Rotterdam, Its Growth, Development of Traffic and Facilities", published by the Municipality of Rotterdam (p. 29).

[2] "Port of Antwerp", a pamphlet published by the Corporation of the City of Antwerp, 1929 (p. 31).

ties or means of access to the port which are carried on with the assistance of the state. The Council has, then, a large part of the functions formerly devolving on the Minister of Public Works, decentralization of which permits acceleration of execution of a great number of projects and assures speedy execution of harbor equipment and repairs in character both large and small. The fostering of new public works is not essentially modified by this change of administration. The state cooperates with the Port Autonomy in these works up to half the total cost thereof.

* * *

In the same way that the Republic of France has turned over to the Port Autonomy these port facilities: quays, locks, storehouses, freight handling machinery, etc., constructed by it, the Chamber of Commerce of Havre has given over to the Port Autonomy all of the facilities that it possessed and operated before: sheds, cranes, fire boats, sea walls, etc. The Port Autonomy has thus the control of all of the maritime and land installations of the port."

In Havre substantially all of the waterfront facilities are owned by the Port Autonomy. In Marseilles, although the port is also controlled by a Port Autonomy, there exists a large private dock development, Compagnie des Docks et Entrepots. In each of these ports the Port Autonomies fix rates and charges, and coordinate the work of the whole port area, including the privately operated facilities, as well as those directly operated by them.

The port organization in Bordeaux, and other French ports, is the same as that of Havre and Marseilles.[1]

The foregoing review of the governmental character of the leading port organizations of the Continent demonstrates that in the regulation and development of their ports

[1] Cunningham's "Port Administration and Operation", 1925, pages 26 and 27.

and harbors, European governments treat these functions as essentially governmental in character.

The Harbor Commissions of Montreal and of Other British Dominion Ports.

The governmental agency in charge of the operation and development of the Port of Montreal is the Harbor Commissioners of Montreal.[1]

The first attempt to improve the Port of Montreal was made in 1830, but the Board of Harbour Commissioners, as it is now constituted, did not take form until August of 1850. In that year the St. Lawrence Ship Channel was placed under the jurisdiction of the Harbour Commissioners of Montreal, for the purpose of undertaking dredging operations to widen and deepen the channel. The Commission was reimbursed for the cost of this work by revenues from tolls charged for use of the channel. The duty of carrying out construction of wharves and other improvements in the port was entrusted to the Harbour Commissioners thereafter from time to time when it was found that private capital could not be persuaded to bear the cost of construction of modern facilities in a port which is ice bound five months of the year.

That this intensive governmental development of the Port of Montreal was necessary and is desirable is attested by

[1] See Montreal Harbour Commissioners Act, 1894—Act 57-58, Victoria, chap. 48; See also 8-9 Edward VII, chap. 24, Statutes of Canada, 1909.

nearly all of the authorities on the subject. In his volume entitled "Port Development", Dr. Roy S. MacElwee of Columbia University, says (page 52):

> "Probably the most thoroughly organised North American port is that of Montreal. This is a public trust with far-reaching rights. Unless a port authority owns the port and has the authority, it cannot accomplish very much. But at Montreal, the moment one steps through the gate into the port area he is under a new government. The port authority maintains its own police force and can make arrests. It can expropriate property required for waterfront developments. It makes its own rates, makes its own laws, and borrows its own money. It owns, operates and controls to the fullest possible extent. It has been remarkably successful."

The organization and control of harbor facilities in Halifax, Vancouver, and other ports of the Dominion of Canada, is practically identical with that of Montreal. The same type of organization on the model either of the Mersey Docks and Improvement Board or of the Board of Harbour Commissioners of Montreal has been adopted for the Australian ports and for those of New Zealand, India, the Federated Malay states and other British Dominions and possessions throughout the world.

At Singapore the Harbour Board controls all the public wharves and dry-docks and owns an estate comprising over 960 acres of land, parts of which it has leased to private industries conducting commercial operations in the port. The Board has its own police force and fire brigade, lights the port area throughout and controls all traffic, does all road-making and repairing, and undertakes the sanitation of the entire port area.

State Port Commissions and Authorities in the United States.

The Port of New York Authority, the Albany Port District Commission and the California Board of State Harbor Commissioners are outstanding examples of the degree of governmental control and organization which it has been found necessary to exercise in the development of our American port and harbor areas. The record in these cases and the Brief submitted on behalf of the Respondents make it unnecessary for your Amicus to refer further to the actions taken by New York and New Jersey in the development of New York harbor. In addition to the activity of the States, the City of New York directly owns the entire New York waterfront. Through its Dock Department it has constructed, and in many cases operates, the docks and piers along the New York side of the harbor waters. *Williams* v. *Mayor,* 105 N. Y. 419, 436; *Matter of Mayor,* 135 N. Y. 253, 262. The governmental organization of the Port of Albany is adequately set forth in the Circuit Court of Appeals' opinion in the *Ten Eyck* case (76 F. (2d) 515).

Similar circumstances have led to the creation of direct agencies of government to administer the affairs of many other ports throughout the United States. When, in 1931, the Commonwealth of Pennsylvania and the State of New Jersey entered into a compact or agreement creating the Delaware River Joint Commission, they authorized it to promote and regulate the port facilities of Philadelphia and Camden and to develop the Delaware River as a highway of commerce between those cities and the sea. Long prior thereto, the City of Philadelphia had gone forward with the development of its own waterfront.

The State of Louisiana has entrusted the control and development of all of the port facilities of New Orleans, including the canal system and the extensive public warehouse systems in that city, to the Board of Commissioners of the Port of New Orleans. Similarly, The Alabama State Docks Commission is "a state agency authorized to conduct 'the operation of all harbors and seaports within the state' and to 'adopt rules * * * for the purpose of regulating, controlling and conducting said operation' and with power 'to fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act'." *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 262.

In Houston, Texas, similar functions are exercised by the Harris County Houston Ship Channel Navigation District. The nature of this body as a governmental agency of the State of Texas engaged in immune governmental functions was upheld in *Wait* v. *Commissioner,* 35 B. T. A. 359.

Galveston, Beaumont, Corpus Christi and other Texas ports possess similar port and harbor authorities.

In California, title to and control of the waterfront of San Francisco is held directly by the State, and the California Board of State Harbor Commissioners administers the affairs of that port. This Court is familiar with the activities of the California State Board of Harbor Commissioners through its consideration of the cases of *Sherman* v. *United States,* 282 U. S. 25, 29 and *United States* v. *California,* 297 U. S. 175. The constitutional immunity of that body was upheld in *Platt* v. *Commissioner,* 35 B. T. A. 472, and the immunity of the development of that port's highways and bridges through the Golden Gate Bridge and Highway District in *Commissioner* v. *Harlan,* 80 F. (2d)

660. A separate California state board exercises joint authority with the Port Commission of San Diego in administering the affairs of that port.

Direction of the facilities of the port of Portland, Oregon, is divided between the Portland Commission of Public Docks and the Port of Portland Commission, the first being a department of the City government and the second a direct agency of the State. Port Commissions or authorities have been created and function in Boston, Massachusetts; Wilmington, Delaware; Charleston, South Carolina; Savannah, Georgia; Oakland, Long Beach, Stockton and Los Angeles, California; Seattle and Olympia, Washington; and in the Great Lakes ports of Milwaukee and Chicago, as well as the ports of the State of Michigan. The Port of Milwaukee has entrusted to it the development and regulation of its airport as well as of the waterfront.

While the development of ports and harbors has been a recognized governmental function from the earliest days of history and was such, of course, at the time of the adoption of the Constitution, the statement of this court in *Brush* v. *Commissioner,* 300 U. S. 352, 371, that,

> "Governmental functions are not to be regarded as nonexistent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning."

suggests the recent and necessary development of air*ports* by the States and municipal authorities. In this field, governments have been forced to accommodate themselves to the necessities of the day. See *Wichita* v. *Clapp,* 263 Pac. (Kan.) 12; *Dysart* v. *St. Louis,* 11 S. W. (2d) 1045; *Kremwinkle* v. *Los Angeles,* 4 Cal. (2d) 611; *Hesse* v. *Rath,* 249 N. Y. 436. Thus, the Board of Port Commissioners of the Port of Oak-

land has also devoted much of their effort toward the establishment of the Oakland Municipal Airport. They feel that it is an integral part of port development in that it serves the needs of commerce and shipping by air, which, in turn, is coordinated with the waterway, highway and other facilities of the port.

Federal Port Organizations.

The Federal Government has recognized the need of direct governmental control and operation of port facilities in the Panama Canal Zone and operates and controls directly all of the piers, wharves, warehouses and storage facilities both at the Atlantic and Pacific termini of the Canal. (See *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401.)

The largest port under the direct control and jurisdiction of the Federal government is, however, the Port of Honolulu in the Territory of Hawaii. The regulation and control of the facilities of this port, as of all other ports and harbors within the territory of Hawaii, is entrusted to a body called the Board of Harbor Commissioners of the Territory of Hawaii, appointed by the Governor of the Territory. This Board owns extensive wharves and other terminal facilities in the harbor of Honolulu and other Hawaiian ports and makes regulations concerning all matters of navigation connected with those ports.

The Territorial Board of Harbor Commissioners has been authorized to collect port dues as well as charges for the use of harbor facilities and has come to be a fully self-liquidating public agency. (See Joint Resolution No. 5, Territorial Legislature of Hawaii, 1929.)

POINT II.

The Nature of Port Development is Such That it Can Be Accomplished Only By Governmental Action.

We have shown that port development is a function which has always been within the province of government and which today is universally exercised by governmental agencies. *Moreover it is a function which imperatively requires the functioning of a governmental agency for its adequate and effective execution.*

The problem of port development today is one of *coordinating* waterway, shipping, highway, terminal and railroad facilities into a workable whole which allows the flow of freight and passengers through the gateway known as the Port. To attempt, as does the petitioner in his brief, to characterize port development by the states as simply a "transportation business," and therefore taxable, is simply meaningless. It misses the whole purpose of port development. Countless recognized and accepted functions of government may be said to concern "transportation."

The growth of the present day Port has been described as follows:[1]

> "At the beginning of the nineteenth century the American port was simply a harbor, a meeting place of overseas and coastwise sailing ships. Its only lines of communication were by water. It existed in an Eden of shipwrights, chandlers, sailmakers, barnacles, and bluff candor. Its hinterland was in its own back yard. It was innocent of high-pressure competition until the Erie Canal, wriggling its seven-million-dollar way from Lake Erie to the Hudson in 1825, tempted New York

[1] "Eight U. S. Ports", Fortune, September 1937, page 92.

with the apple of the interior, offering it the concentrated tonnage of the opening West. This tonnage attracted the ships of the world, created a reciprocal market, gave rise to a superstructure of terminals, insurance companies, and export houses. * * *

"This thrust of commerce from the interior of the land to the sea marked the beginning of a remarkable change in the American port. Of course it was still a harbor. It still had its natural advantages or drawbacks in relation to other harbors, in terms of location, climate, depth, and tidal variations. But with the development of nationwide commerce it began to depend more and more for its prosperity upon competitive land forces—in a word, the railroads. These became the arteries that pumped its lifeblood to and from its hinterland. So that today the port has become a land phenomenon. It may even be manmade, by means of channels. And the main factors that control its destiny are railroad transportation rates, terminal charges, local industries, flexibility of operation, and availability of shipping services."

What can happen when government fails to resolve conflicting interests and coordinate transportation, terminals, highways and harbor service in a port area, is illustrated by conditions in the Port of New York in 1916. (See *New York Harbor Case,* 47 I. C. C. 643, 732, 733). The flow of goods becomes irregular, terminal costs rise, and traffic congestion piles up a heavy burden of wasteful expense. These drags on commerce sharply raise the cost of living, not only in the port district, but also in the country at large. In an extreme case, as happened in New York during the World War, governmental neglect can bring about such a breakdown in transport as to prevent the clearance of war materials. (Record, Stipulation Exhibit B, p. 35.) There was a similar failure of port facilities during the World War, at all of the ports on the Atlantic coast, but it was

especially serious at the Port of New York because of the vast amount of supplies it was called upon to handle.

The effect of the lack of coordination of port facilities upon the standard of living is described by Dr. Roy S. MacElwee, in "Ports and Terminal Facilities" (1918), as follows (pp. 2, 3):

> "From the purely local viewpoint each consumer is concerned with this question. If the public carrier, the railway or ship company, is not particularly interested in the reduction of the *'frais parasites'* of transportation at the terminals, which adds its big bit to the high cost of living, the nation is. * * * The long years of public indifference to the drag on its resources by unnecessary expenses of transportation at terminals have come to an end."[1]

The public *need* for comprehensive port planning, is therefore, clear. If it be shown that that need can be satisfied *only by governmental agencies,* how can the Commissioner support a contention that such activity is "proprietary?"

Port development requires capital investment of enormous size. Accurate figures of the whole picture are not avail-

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[1] The public need for port coordination is well set forth by Brysson Cunningham, Lecturer on Waterways, Harbours and Docks at University College, London, in "Port Administration and Operation" (p. 13):

> "There is, unquestionably, scope for a closer degree of co-operation between municipal, railway and port authorities and government departments in regard to the arrangement and working of the whole chain of operations connected with the reception and despatch of goods at the quayside. All are alike interested in the prosperity of the port, some perhaps indirectly, but none the less essentially, and the reaction of an unnecessary delay in the handling of cargo at the quayside will be felt ultimately by the ordinary citizen in an inflation of the prices of the commodities which he purchases in the shops. In the past, too little attention, unfortunately, has been paid to the matter."

able, but from a survey of the capital investments of the port bodies represented in the membership of the American Association of Port Authorities, we have no hesitation in stating that *billions* are involved.

Pecuniary profit cannot be derived from these investments.[1] *It is only government which is satisfied with the type of "profit", substantial as it is, which can be derived from these operations—the health, comfort and prosperity of the peoples of the State.*

All authorities agree that only government can exert the regulatory efforts which such planning requires.

Thus, the authors of a treatise on the Port of Hamburg concluded:

> "Three main considerations have always guided the State in the exercise of its authority in matters relating to the harbour, viz., (1) that berthing accommodation should be alloted impartially to all comers; (2) that the harbour facilities should be employed in conformity with their intended purposes, and (3) that they should be appropriately utilized in accordance with their respective capacities. Only a body not exclusively influenced in its decisions by business considerations could be expected to apply these guiding lines to actual practice."[2]

Dr. MacElwee is equally positive in his conclusion that, because of diversity of interests, only governmental ef-

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[1] *Cunningham,* "Port Administration and Operation", at page 4.

"The conditions under which ports in general have to work are such that, while they are unquestionably essential national assets, and freely recognised as such, they can very rarely make any remunerative return on the capital invested in them."

[2] "The Port of Hamburg" by L. Wendemuth and W. Böttcher, page 180.

fort can prevent the economic anarchy of an uncoordinated port. He says:

> "The marine terminal problem is a national and not a private one. The railroads have been interested in reducing the costs of the ton-mile over their own road bed, but have had little concern with the expenses at the terminals because these expenses in the major part are paid by the shipper, and ultimately by the consumers. The same may be said of the steamship lines. The terminal problem is not in the way of being successfully settled by private interests. * * * *The creation of a successful port requires large constructive action on the part of municipal, state, and national governments to guide and correlate, and even to compel conformity to a definite policy to be followed by all interests concerned.*"[1] (Italics ours.)

And the record in the present cases bears out the difficulty of securing the cooperation of private interests in port development. The Assistant General Manager of the Port Authority testifying as to the lighterage problem in New York Harbor said (Record, folio 397-398):

> "We have had the cooperation of the railroads in making fact-finding studies in almost every case, but there their cooperation has largely terminated, except in the case of the inland terminal. After we made this factual study of marine activities * * * we found tremendous savings, running into several millions of dollars. We submitted that study to the railroads in an effort to get them to cooperate by unifying or consolidating or pooling their marine activities and saving these millions of dollars in terminal expenses.
>
> "We have found that the policy of the railroads is to unify such activities only to a very slight degree, *and usually as more or less forced to do so by pressure of public agencies.*"

[1] "Ports and Terminal Facilities", at page 2.

Major-General Lansing H. Beach, when Chief of Engineers of the United States Army, expressed the view of the Board of Engineers for Rivers and Harbors as follows:

> "The belief of the Board is, however, that the railroads should be compelled to divest themselves of their ownership of these port terminal properties, and that preferably they should pass to public ownership and control."[1]

This Court itself has recognized the need for government supervision of port development, holding that attempted grants of waterfront property for purely private purposes are abdications of sovereign power and a derogation of the public trust in which the states hold these lands for the purpose of port development. In *Illinois Central R. R. Co. v. Illinois,* 146 U. S. 387, 452 (1892), the Court declared:

> "The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purposes, no valid objections can be made to the grants. * * * But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, of a sea or lake. *Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property.*" (Italics ours.)

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[1] Paper on National Port Problems, Conference of the American Society of Civil Engineers, 1924, cited in Cunningham "Port Administration and Operation", at page 40.

Finally, how can the Commissioner of Internal Revenue urge that port development is not a function of State government, in the face of the following express declaration of Congress (40 Stat. 1286):

> "It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, *constructed, owned and regulated by the municipality or other public agency of the state and open to the use of all on equal terms.*" (Italics ours.)

and in the face of the War Department's declaration that:

> "Whether by sufferance, or for convenience, or by necessity, the Congress and its agencies have refrained from occupying the field of port control in several directions. Indeed, it may be said, as a general proposition, that port administration is largely in the hands of local authorities rather than under Federal control."[1]

As a matter of *national policy,* therefore, port development is peculiarly a function of State government. This national policy is recognized by the Circuit Court of Appeals in the *Ten Eyck* case, 76 F. (2d) 515, 517:

> "Nor can the development of port or terminal facilities be classified solely as federal or private functions. There are many instances of State control or control under a state agency, and the statutes contemplate that the development of harbor and port facilities be mainly in the hands of the states. The federal government has encouraged the upbuilding of ports of the nation by the states themselves. Nothing enacted by Congress or done by the federal government indicates a desire to exclude or restrict state participation in carrying out

[1] United States War Department (Corps of Engineers), "Shore Control and Port Administration," 1923 page 136.

these projects which were desirable from the standpoint of state governments. *On any broad consideration it may reasonably be considered as a usual governmental function of a state.*" (Italics ours.)

POINT III.

WHEREFORE, the American Association of Port Authorities joins in the prayer of the Respondents herein that the determination of the Circuit Court of Appeals herein be affirmed.

Respectfully submitted,

MARKELL C. BAER,
Attorney for the American
Association of Port Authorities.

Dated: March, 1938.

pp. 1, 3, 13; 4

SUPREME COURT OF THE UNITED STATES.

Nos. 779, 780, 781.—October Term, 1937.

779 Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Philip L. Gerhardt.

780 Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Billings Wilson.

781 Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* John J. Mulcahy.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

23

[May ~~16~~, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the imposition of a federal income tax for the calendar years 1932 and 1933 on salaries received by respondents, as employees of the Port of New York Authority, places an unconstitutional burden on the States of New York and New Jersey.

The Port Authority is a bi-state corporation, created by compact between New York and New Jersey, Laws of N. Y., 1921, c. 154; Laws of N. J., 1921, c. 151, approved by the Congress of the United States by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174. The compact authorized the Authority to acquire and operate "any terminal or transportation facility" within a specified district embracing the Port of New York and lying partially within each state. It directed the Authority to recommend a comprehensive plan for improving the port and facilitating its use, by the construction and operation of bridges, tunnels, terminals and other facilities. The Authority made such a recommendation in its re-

port of December, 1921, adopted by the two states in 1922. Laws of N. Y., 1922, c. 43; Laws of N. J., 1922, c. 9.

In conformity to the plan, and pursuant to further legislation of the two states, the Authority has constructed the Outerbridge Crossing Bridge, the Goethals Bridge, the Bayonne Bridge, and the George Washington Bridge, interstate vehicular bridges all passing over waters of the harbor or adjacent to it. It has also constructed the Holland Tunnel and the Lincoln Tunnel, interstate vehicular tunnels passing under the Hudson River. These enterprises were financed in large part by funds advanced by the two states and by the Port Authority's issue and sale of its bonds. In addition, the Authority operates an interstate bus line over the Goethals Bridge. It has erected and operates the Port Authority Commerce Building in New York City, which houses Inland Terminal No. 1, devoted to use as a freight terminal in connection with a plan to coordinate transportation facilities and reduce congestion. The terminal has no physical connection with any railroad facilities, dock or pier, but is used as a transfer terminal for interchange of freight brought by truck from and to the terminal and to and from eight railroad terminals.

The Port Authority collects tolls for the use of the bridges and tunnels, and derives income from the operation of the bus line and terminal building, but it has no stock and no stockholders, and is owned by no private persons or corporations. Its projects are all said to be operated in behalf of the two states and in the interests of the public, and none of its profits enure to the benefit of private persons. Its property and the bonds and other securities issued by it are exempt by statute from state taxation. The Joint Resolution of Congress consenting to the comprehensive plan of port improvement, Pub. Res. No. 66, 67th Cong., H. J. Resolution No. 337, July 1, 1922, declares that the activities of the Port Authority under the plan "will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation." Statutes of New York and New Jersey relating to the various projects of the Port Authority declare that they are "in all respects for the benefit of the people of the two States, for the increase of their commerce and prosperity, and for the improvement of their health and living con-

ditions, and the Port Authority shall be regarded as performing a governmental function in undertaking the said construction, maintenance and operation and in carrying out the provisions of law relating to the said [bridges and tunnels] and shall be required to pay no taxes or assessments upon any of the property acquired by it for the construction, operation and maintenance of such" bridges and tunnels. Laws of N. J., 1925, c. 37, § 7; Laws of N. Y., 1925, c. 210, § 7; Laws of N. J., 1926, c. 6, § 7; Laws of N. Y., 1926, c. 761, § 7; Laws of N. J., 1927, c. 3, § 7; Laws of N. Y., 1927, c. 300, § 7; Laws of N. J., 1931, c. 4, § 14; Laws of N. Y., 1931, c. 47, § 14.

The respondents, during the taxable years in question, were respectively a construction engineer and two assistant general managers, employed by the Authority at annual salaries ranging between $8,000 and $15,000. All took oaths of office, although neither the compact nor the related statutes appear to have created any office to which any of the respondents were appointed, or defined their duties or prescribed that they should take an oath. The several respondents having failed to return their respective salaries as income for the taxable years in question, the commissioner determined deficiencies against them. The Board of Tax Appeals found that the Port Authority was engaged in the performance of a public function for the states of New York and New Jersey, and ruled that the compensation received by the Authority's employees was exempt from federal income tax. The Court of Appeals for the Second Circuit affirmed without opinion on the authority of *Brush* v. *Commissioner,* 85 F. (2d) 32, aff'd. 300 U. S. 352; *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401. We granted certiorari because of the public importance of the question presented. — U. S. —.

rev'd.

The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an implied limitation stems from *McCulloch* v. *Maryland,* 4 Wheat. 316, in which it was held that a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, implied as an incident to the borrowing, taxing, war and other powers spe-

cifically granted to the national government by Article I, § 8 of the Constitution. It was held that Congress, having power to establish a bank by laws which, when enacted under the Constitution, are supreme, also had power to protect the bank by striking down state action impeding its operations; and it was thought that the state tax in question was so inconsistent with Congress's constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to the federal bank notes.[1] Cf. *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 865-868.

In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on ~~federal~~ state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.[2]

[1] It follows that in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation. Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation. Congress may curtail an immunity which might otherwise be implied, Van Allen *v.* The Assessors, 3 Wall. 573, or enlarge it beyond the point where, Congress being silent, the Court would set its limits. Bank *v.* Supervisors, 7 Wall. 26, 30, 31; see Thomson *v.* Pacific Railroad, 9 Wall. 579, 588, 590; Shaw *v.* Gibson-Zahniser Oil Corp., 276 U. S. 575, 581, and cases cited; James *v.* Dravo Contracting Co., 302 U. S. 134, 161.

The analysis is comparable where the question is whether federal corporate instrumentalities are immune from state judicial process. Federal Land Bank *v.* Priddy, 295 U. S. 229, 234-235.

[2] "The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their

It was perhaps enough to have supported the conclusion that the tax was invalid, that it was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress of a national power. Such discrimination was later recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities. *Miller* v. *Milwaukee*, 272 U. S. 713; cf. *The Pacific Co., Ltd.* v. *Johnson*, 285 U. S. 480, 493. But later cases have declared that federal instrumentalities are similarly immune from non-discriminatory state taxation—from the taxation of obligations of the United States as an interference with the borrowing power, *Weston* v. *Charleston*, 2 Pet. 449; and from a tax on "offices" levied upon the office of a captain of a revenue cutter. *Dobbins* v. *Erie County*, 16 Pet. 435.[3]

That the taxing power of the federal government is nevertheless subject to an implied restriction when applied to state instrumentalities was first decided in *Collector* v. *Day*, 11 Wall. 113,

representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme." Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat. 316, 435-436.

[3] In these cases, and particularly in Weston *v.* Charleston, 2 Pet. 449, as in McCulloch *v.* Maryland, emphasis was laid on the fact that by state action an impediment was laid upon the exercise of a power with respect to which the national government was supreme. In Weston *v.* Charleston, *supra*, Chief Justice Marshall said (pp. 465, 466):

"Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the union which possesses the right of taxation, to burthen the exercise of this power [the borrowing power] at their discretion?

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy." Compare Holmes, J., in Panhandle Oil Co. *v.* Knox, 277 U. S. 218, 223.

where the salary of a state officer, a probate judge, was held to be immune from federal income tax. The question there presented to the Court was not one of interference with a granted power in a field in which the federal government is supreme, but a limitation by implication upon the granted federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence.

The Court pointed out that the states were in existence as such entities when the Constitution was adopted; that the Constitution guaranteed to them a republican form of government and undertook to protect them from invasion and domestic violence; that it presupposes the continued existence of the states[4] and their continued performance, free of inhibition by the national taxing power, of "the high and responsible duties assigned to them in the Constitution . . . And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it," the Court declared, "we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department . . . All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the

[4] In 1871, when Collector *v.* Day was decided, the Court had not yet been called on to determine how far the Civil War Amendments had broadened the federal power at the expense of the states. The Slaughterhouse Cases, 16 Wall. 36, had not yet been decided, although they had already been once before the Court on motion for supersedeas, 10 Wall. 141. The fact that the taxing power had recently been used with destructive effect upon a state instrumentality, Veazie Bank *v.* Fenno, 8 Wall. 533, had suggested the possibility of similar attacks upon the existence of states themselves. Compare Lane County *v.* Oregon, 7 Wall. 71, 76-77; Slaughterhouse Cases, 16 Wall. 36, 82.

general government is found in that instrument." 11 Wall. 125, 126.

We need not stop to inquire how far, as indicated in *McCulloch* v. *Maryland, supra*, the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. It is enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector* v. *Day, supra*, was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state "could long preserve its existence".

There are cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised by implication, should be narrowly limited. One, as was pointed out by Chief Justice Marshall in *McCulloch* v. *Maryland, supra*, 435-436, and *Weston* v. *Charleston, supra*, 465-466, is that the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.

Another reason rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; cf. *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 588, 590. With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was

adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See *South Carolina* v. *United States,* 199 U. S. 437, 454-455. Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive.[5]

In tacit recognition of the limitation which the very nature of our federal system imposes on state immunity from taxation in order to avoid an ever expanding encroachment upon the federal taxing power, this Court has refused to enlarge the immunity substantially beyond those limits marked out in *Collector* v. *Day, supra.* It has been sustained where, as in *Collector* v. *Day,* the function involved was one thought to be essential to the maintenance of a state government: as where the attempt was to tax income received from the investments of a municipal subdivision of a state, *United States* v. *Railroad Co.,* 17 Wall. 322; to tax income received by a private investor from state bonds, and thus threaten impairment of the borrowing power of the state, *Pollock* v. *Farmers' Land & Trust Co.,* 157 U. S. 429; cf. *Weston* v. *Charleston, supra,* 465-466; or to tax the manufacture and sale to a municipal corporation of equipment for its police force, *Indian Motocycle Co.* v. *United States,* 283 U. S. 570.

But the Court has refused to extend the immunity to a state conducted liquor business, *South Carolina* v. *United States, supra; Ohio*

[5] Compare notes 1 and 2, *supra.*

v. *Helvering*, 292 U. S. 360, or to a street railway business taken over and operated by state officers as a means of effecting a local public policy. *Helvering* v. *Powers*, 293 U. S. 214. It has sustained the imposition of a federal excise tax laid on the privilege of exercising corporate franchises granted by a state to public service companies. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 157. In each of these cases it was pointed out that the state function affected was one which could be carried on by private enterprise, and that therefore it was not one without which a state could not continue to exist as a governmental entity. The immunity has been still more narrowly restricted in those cases where some part of the burden of a tax, collected not from a state treasury but from individual taxpayers, is said to be passed on to the state. In these cases the function has been either held or assumed to be of such a character that its performance by the state is immune from direct federal interference; yet the individuals who personally derived profit or compensation from their employment in carrying out the function were deemed to be subject to federal income tax.[6]

In a period marked by a constant expansion of government activities and the steady multiplication of the complexities of taxing systems, it is perhaps too much to expect that the judicial pronouncements marking the boundaries of state immunity should present a completely logical pattern. But they disclose no purposeful departure from, and indeed definitely establish, two guiding principles of limitation for holding the tax immunity of state

[6] The following classes of taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state: Those who derive income or profits from their performance of state functions as independent engineering contractors, Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, or from the resale of state bonds, Willcuts *v.* Bunn, 282 U. S. 216; those engaged as lessees of the state in producing oil from state lands, the royalties from which, payable to the state, are devoted to public purposes, Group No. 1 Oil Corporation *v.* Bass, 283 U. S. 279; Burnet *v.* Jergins Trust, 288 U. S. 508; No. 388, Bankline Oil Co. *v.* Commissioner, and No. 600, Helvering *v.* Mountain Producers Corp., both decided March 7, 1938, overruling Burnet *v.* Colorado Oil & Gas Co., 285 U. S. 393. Similarly federal taxation of property transferred at death to a state or one of its municipalities was upheld in Snyder *v.* Bettman, 190 U. S. 349, cf. Greiner *v.* Lewellyn, 258 U. S. 384; and a federal tax on the transportation of merchandise in performance of a contract to sell and deliver it to a county was sustained in Wheeler Lumber Bridge & Supply Co. *v.* United States, 281 U. S. 572; cf. Indian Motocycle Co. *v.* United States, 283 U. S. 570. A federal excise tax on corporations, measured by income, including interest received from state bonds, was upheld in Flint *v.* Stone Tracy Co., 220 U. S. 107, 162, *et seq.*; see National Life Insurance Co. *v.* United States, 277 U. S. 508, 527; compare the discussion in Educational Films Corp. *v.* Ward, 282 U. S. 379, 389, and in Pacific Co., Ltd. *v.* Johnson, 285 U. S. 480, 490.

instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. The state itself was taxed for the privilege of carrying on the liquor business in *South Carolina* v. *United States, supra,* and in *Ohio* v. *Helvering, supra;* and a tax on the income of a state officer engaged in the management of a state-owned corporation operating a street railroad was sustained in *Helvering* v. *Powers, supra,* because it was thought that the functions discouraged by these taxes were not indispensable to the maintenance of a state government. The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons. *Metcalf & Eddy* v. *Mitchell, supra; Willcuts* v. *Bunn,* 282 U. S. 216.

With these controlling principles in mind we turn to their application in the circumstances of the present case. The challenged taxes laid under § 22, Revenue Act of 1932, c. 209, 47 Stat. 169, 178, are upon the net income of respondents, derived from their employment in common occupations not shown to be different in their methods or duties from those of similar employees in private industry. The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government and are not beyond the reach of its taxing power. A non-discriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system. Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail

any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see *Indian Motocycle Co.* v. *United States, supra*, p. 581, footnote 1) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far.

The fact that the expenses of the state government might be lessened if all those who deal with it were tax exempt was not thought to be an adequate basis for tax immunity in *Metcalf & Eddy* v. *Mitchell, supra*, in *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, in *Burnet* v. *Jergins Trust*, 288 U. S. 508; or in *Helvering* v. *Mountain Producers Corp.*, No. 800, decided March 7, 1938.[7] When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural. *Willcuts* v. *Bunn, supra*, 231. The extent to which salaries in business or professions whose standards of compensation are otherwise fixed by competitive conditions may be affected by the immunity of state employees from income tax is to a high degree conjectural.

The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional

[7] Upon full consideration, the same principle was recently applied in *James v. Dravo Contracting Co.*, 302 U. S. 134, although the limitation there was upon the immunity of the federal government.

immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

During the present term we have held that the compensation of a state employee paid from the state treasury for his service in liquidating an insolvent corporation, where the state was reimbursed from the corporate assets, was subject to income tax *McLoughlin* v. *Commissioner,* No, 287, decided February 28, 1938. But the Court has never ruled expressly on the precise question whether the Constitution grants immunity from federal income tax to the salaries of state employees performing, at the expense of the state, services of the character ordinarily carried on by private citizens. The Revenue Act of 1917, considered in *Metcalf & Eddy* v. *Mitchell, supra,* exempted the salaries of all state employees from income tax. But it was held in that case that neither the constitutional immunity nor the statutory exemption extended to independent contractors. In *Brush* v. *Commissioner, supra,* the applicable treasury regulation upon which the Government relied exempted from income tax the compensation of "state officers and employees" for "services rendered in connection with the exercise of an essential governmental function of the State". The sole contention of the Government was that the maintenance of the New York City water supply system was not an essential governmental function of the state. The Government did not attack the regulation. No contention was made by it or considered or decided by the Court that the burden of the tax on the state was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity. If determination of that point was implicit in the decision it must be limited by what is now decided.

The pertinent provisions of the regulation applicable in the *Brush* case were continued in Regulations 77, Article 643, under the 1932 Revenue Act, until January 7, 1938, when they were amended to provide that "Compensation received for services rendered to a State is to be included in gross income unless the person receives such compensation from the State as an officer or employee thereof and such compensation is immune from taxation under the Constitution of the United States." The applicable provisions of § 116 of the 1932 Act do not authorize the exclusion from gross income of the salaries of employees of a state or a state-owned corporation. If the regulation be deemed to embrace the employees

of a state-owned corporation such as the Port Authority, it was unauthorized by the statute. But we think it plain that employees of the Port Authority are not employees of the state or a political subdivision of it within the meaning of the regulation as originally promulgated, an additional reason why the regulation, even before the 1938 amendment, was ineffectual to exempt the salaries here involved.

The reasoning upon which the decision in *Indian Motocycle Co.* v. *United States, supra,* was rested is not controlling here. Taxation of the sale to a state, which was thought sufficient to support the immunity there, is not now involved. Whether the actual effect upon the performance of the state function differed from that of the present tax we do not now inquire. Compare *Wheeler Lumber Bridge & Supply Co.* v. *United States,* 281 U. S. 572.

As was pointed out in *Metcalf & Eddy* v. *Mitchell, supra,* 524, there may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of it would threaten such interference with the functions of government itself as to be considered beyond the reach of the federal taxing power. If the tax considered in *Collector* v. *Day, supra,* upon the salary of an officer engaged in the performance of an indispensable function of the state which cannot be delegated to private individuals, may be regarded as such an instance, that is not the case presented here.

Expressing no opinion whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or its other activities, we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government. So much of the burden of the tax laid upon respondents' income as may reach the state is but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the federal government.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

Nos. 779, 780, 781.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
779 *vs.*
Philip L. Gerhardt.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
780 *vs.*
Billings Wilson.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
781 *vs.*
John J. Mulcahy.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 23, 1938.]

Mr. Justice Black, concurring.

I agree that this cause should be reversed for the reasons expressed in that part of the opinion just read pointing out that: respondents, though employees of the New York Port Authority, are citizens of the United States; the tax levied upon their incomes from the Authority is the same as that paid by other citizens receiving equal net incomes; and payment of this non-discriminatory income tax by respondents cannot impair or defeat in whole or in part the governmental operations of the State of New York. A citizen who receives his income from a State, owes the same obligation to the United States as other citizens who draw their salaries from private sources or the United States and pay Federal income taxes.

While I believe these reasons, without more, are adequate to support the tax, I find it difficult to reconcile this result with the principle announced in *Collector* v. *Day*, 11 Wall. 113, and later decisions applying that principle. This leads me to the conclusion that we should review and reexamine the rule based upon *Collector* v. *Day*. That course would logically require the entire subject of in-

tergovernmental tax immunity to be reviewed in the light of the effect of the Sixteenth Amendment authorizing Congress to levy a tax on incomes "from whatever source derived"; and, in that event, the decisions interpreting the Amendment would also be reexamined.[1]

From time to time, this Court has relied upon a doctrine evolved from *Collector* v. *Day,* under which incomes received from State activities thought by the Court to be non-essential are held taxable, while incomes from activities thought to be essential are held nontaxable. The opinion of the Court in this case refers to that doctrine. Application of this test has created "a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.'" *Brush* v. *Commissioner,* 300 U. S. 352, 365. Under this rule the tax status of every State employee remains uncertain until this Court passes upon the classification of his particular employment. The result is a confusion in the field of intergovernmental tax immunity which I believe could be clarified by complete review of the subject. Testing taxability by judicial determination that State governmental functions are essential or non-essential, contributes much to the existing confusion. I believe the present case affords occasion for appropriate and necessary abandonment of such a test, particularly since recent decisions[2] have already substantially advanced toward a reexamination of the doctrine of intergovernmental immunity.

The present controversy illustrates the necessity for further reexamination. New York created the Port Authority with power to engage in activities which that State believed to be essential. Yet, under this test, New York's determination is not final until reviewed in a tax litigation between the government and a single citizen.

Conceptions of "essential governmental functions" vary with individual philosophies. Some believe that "essential governmental functions" include ownership and operation of water plants, power and transportation systems, etc. Others deny that such

[1] See, Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1; Peck & Co. *v.* Lowe, 247 U. S. 165, 172; Eisner *v.* Macomber, 252 U. S. 189; Evans *v.* Gore, 253 U. S. 245.

[2] See, James *v.* The Dravo Contracting Co., 302 U. S. —; Helvering *v.* Bankline Oil Co., 302 U. S. —; Helvering *v.* Mountain Producers Corp., 302 U. S. — (overruling Gillespie *v.* Oklahoma, 257 U. S. 501 and Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393).

ownership and operation could ever be "essential governmental functions" on the ground that such functions "could be carried on by private enterprise." A Federal income tax levied against the manager of the state-operated elevated railway company of Boston was sustained even though this manager was a public officer appointed by the Governor of Massachusetts "with the advice and consent of the council."[3] On the other hand, the Federal government was denied—although with strong dissent—the right to collect an income tax from the chief engineer in charge of New York City's municipally owned water supply.[4] An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the "essential" and "non-essential" test.

There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people —acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

Surely, the Constitution contains no imperative mandate that public employees — or others — drawing equal salaries (income) should be divided into taxpaying and non-taxpaying groups. Ordinarily such a result is discrimination. Uniform taxation upon those equally able to bear their fair shares of the burdens of government is the objective of every just government. The language of the Sixteenth Amendment empowering Congress to "collect taxes on incomes from whatever source derived"—given its most obvious meaning—is broad enough to accomplish this purpose.

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[3] Helvering *v.* Powers, 293 U. S. 214, 222, 223.

[4] Brush *v.* Commissioner, 300 U. S. 352; cf., Metcalf & Eddy *v.* Mitchell, 269 U. S. 514.

SUPREME COURT OF THE UNITED STATES.

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[May 23, 1938.]

Mr. Justice Butler, dissenting.

So far as concerns liability for federal income tax, the salaries paid by the Port Authority to its officers and employees are not distinguishable from salaries paid by States to their officers and employees. The judgment of the Circuit Court of Appeals should therefore be affirmed on the principle applied in *M'Culloch* v. *Maryland* (1819) 4 Wheat. 316, that under the Constitution States are without power to tax instrumentalities of the United States and in *The Collector* v. *Day* (1871) 11 Wall. 113, that the United States is without power to tax the salary of a state officer. That principle has been followed in a long line of decisions. In *Indian Motocycle Co.* v. *United States* (1931) 283 U. S. 570, we held the United States without power to tax the sale of a motorcycle to a municipal corporation for use in its police service. The Court, speaking through Mr. Justice Van Devanter, said (p. 575):

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are

exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector *v.* Day, 11 Wall. 113, 125, 127; Willcuts *v.* Bunn, 282 U. S. 216, 224-225. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch *v.* Maryland, 4 Wheat. 316, 430; United States *v.* Baltimore & Ohio R. Co., 17 Wall. 322, 327; Johnson *v.* Maryland, 254 U. S. 51, 55-56; Gillespie *v.* Oklahoma, 257 U. S. 501, 505; Crandall *v.* Nevada, 6 Wall. 35, 44-46."

Following that case, we recently applied the principle in *N. Y. ex rel. Rogers* v. *Graves* (January 4, 1937) 299 U. S. 401, to prevent the State of New York from taxing the salary of counsel of the Panama Railway Company, a federal instrumentality, and in *Brush v. Commissioner* (March 15, 1937) 300 U. S. 352, to prevent the United States from taxing the salary of the chief engineer of the bureau of water supply for the city of New York. In *Helvering* v. *Therrell* (February 28, 1938) — U. S. —, holding that the federal government has power to tax compensation paid to attorneys and others out of corporate assets for necessary services rendered about the liquidation of insolvent corporations by state officers proceeding under her statutes, we said (p. —):

"Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

The Court, seemingly admitting that it would be futile to attempt to distinguish the cases now before us from the *Brush* case, overrules it by declaring that it must be limited by what is now decided. The Solicitor General did not in any manner raise the point on which the Court puts this decision. He sought reversal on the grounds that the Port Authority's activities are proprietary in nature; that it is not an agency created by the States alone; that it operates in interstate commerce subject to the paramount

power of Congress. Indeed, he expressly disclaimed intention to ask re-examination of the doctrine of immunity on which the *Brush* case rests. In substance, as well as in the language used, the decision just announced substitutes for that doctrine the proposition that, although the federal tax may increase cost of state governments, it may be imposed if it does not curtail functions essential to their existence. Expressly or *sub silentio*, it overrules a century of precedents. Cf. *James* v. *Dravo Contracting Co.* (December 6, 1937) 302 U. S. 134, 152, 161; *Helvering* v. *Mountain Producers Corporation* (March 7, 1938) — U. S. —, —, — (82 L. Ed. 607, 613, 615). As they stood when the cases now before us were in the Circuit Court of Appeals, our decisions required it to hold that the salaries paid by the Port Authority to respondents are not subject to federal taxation. I would affirm its judgments.

Mr. Justice McReynolds concurs in this opinion.